IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 717

THE OHIO NATIONAL LIFE INSURANCE COMPANY, a corporation, LESLIE C. SMALL and MAY SMALL INGLESH,

Petitioners,

vs.

BOARD OF EDUCATION OF GRANT COMMUNITY HIGH SCHOOL DISTRICT NO. 124 OF LAKE COUNTY, ILLINOIS; ARTHUR H. FRANZEN, as treasurer of Grant Community High School District No. 124 of Lake County, Illinois; ARTHUR G. HIGHGATE, LADDIE RASKA, WILLIAM G. NAGLE, WILLIAM TONYAN and CHARLES BRAINARD, as members of the Board of Education of Grant Community High School District No. 124 of Lake County, Illinois; and JAY B. MORSE, as county clerk of Lake County, Illinois,

Respondents.

REPLY OF PETITIONERS TO THE ANSWER OF RESPONDENTS.

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SUBJECT INDEX.

Page

TABLE OF CASES CITED.

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REPLY OF PETITIONERS TO THE ANSWER OF RESPONDENTS.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, The Ohio National Life Insurance Company, a corporation, Leslie C. Small and May Small

Inglesh, jointly and severally reply to the answer of respondents and say:

I.

Statement.

The suit in the United States District Court was to recover interest evidenced by coupons attached to the bonds here in question. The complaint relied expressly on the validating act and on the validity of the bonds (R. 105). The effect of the validating act was neither admitted nor denied in the answer (R. 106) which put the question in issue and placed the burden upon the plaintiff. That was the sole controverted issue decided by the District Court.

Both the Circuit Court of Lake County and the Supreme Court of Illinois ignored the judgment of the district court insofar as it adjudicated the validity of the bond issue. The Supreme Court limited the effect of that judgment to a mere prevention of the recovery back by the district of the money it had paid pursuant to the judgment.

II.

Basis of Contention that Supreme Court has Jurisdiction.

1. In this case the judgment of the Supreme Court of Illinois is as final as any judgment could ever become. If the cause were first to return to the Circuit Court of Lake County for entry of judgment in accordance with the mandate of the Supreme Court of Illinois, there would then be no question upon which a further appeal could be taken to that court as all issues have been fully argued and decided. Moreover, such a procedure would probably waive the right to petition this court.

In *People* v. *Orvis*, 374 Ill. 536, 30 N. E. (2d) 28, the judgment of the lower court from which the appeal was taken was one denying leave to the taxpayer to file objections. While the decision went into the merits of the objections, the only order that the Supreme Court there could actually enter was that the taxpayer be given leave to file his objections. The cause was in its procedural stages. Here there is no further relief which petitioners can obtain in the courts of Illinois.

2. The suit in the district court was founded on the theory that the bonds had been validated and consequently the interest coupons were collectible. The two were legally inseparable. If the bonds were not good, the coubonds were not collectible. If the bonds were valid, the coupons were good. Recovery was predicated on the validity of the bonds.

3. Petitioners, Leslie C. Small and May Small Inglesh, were not nor was their ancestor a direct party to the suit in the federal court. They undoubtedly stand on a different basis than the Ohio National Life Insurance Company, but claim the benefit of the judgment on the theory that there is sufficient privity and identity of interest.

4. The judgment of the district court was based on a complaint expressly alleging the validity of the bonds. It was not of course necessary that the judgment at law make findings of fact and law upon which it was based. The pleadings (R. 105 and 106) presented only the issue of the validity of the bonds. One of the attorneys (R. 83) who tried the case before the district court testified that the first *Orvis* case was extensively discussed; that the real point argued was the validity of the bonds and (R. 84) that the validating act set out in the complaint was

brought before the court. He also testified that the evidence established the ownership of the coupons.

The recognition of the federal court judgment by the Supreme Court of Illinois is limited entirely to a refusal to force the insurance company to return the money which it had received under the compulsion of that judgment.

5. The Supreme Court of Illinois did fail to give full faith and credit to the district court judgment as it refused to regard as adjudicated the very point which was the basis of that judgment and which is now relied on by petitioners.

6. The Supreme Court of Illinois did not recognize the district court judgment; the case of *Cromwell* v. *County of Sac*, 94 U. S. 351, does not militate against the position of petitioners. Insofar as it is relevant it supports our contention.

III.

The Question Presented.

The attempt of respondent to make a distinction between the issues involved in this cause and those involved in the District Court suit on the ground that that was a suit on coupons, while this is on the bonds and on later coupons is without substantial foundation. The legal identity of bonds and the interest coupons has been established by decisions of this court which will be alluded to in subsequent parts of this reply.

The subject matter is sufficiently identical that the adjudication of the legality of coupons establishes, as between the same parties, the legality of the bonds to which the coupons are appurtenant.

The position of Leslie C. Small and May Small Inglesh has already been referred to, and authorities on their position will be cited hereinafter. They were not required to set up and rely on the prior adjudication in their pleadings for the reason that the stipulation of the parties (R. 104) provided that either side might offer proof of any relevant facts and insist on any claim or defense brought to the attention of the court, and that such facts, claims or defense should be received and considered by the court "the same as though it were well pleaded." Moreover, it is the settled doctrine of this court that former adjudication need not be specially pleaded.

The question presented, as stated in our original petition, may in view of respondents' answer be amplified to cover the inquiry whether the Supreme Court of Illinois may destroy the effect of a prior judgment by limiting it to the money adjudged to be paid and closing its eyes to the legal foundation upon which such recovery rested.

IV.

Reasons Relied on for Allowance of Writ.

The claim of respondents that this is a different claim or cause of action proceeds, as does the opinion of the Supreme Court of Illinois, on the assumption that the coupons which represent interest are separable from the bonds themselves,—that the former may be valid and the latter void.

The pretense that the former judgment is being given effect by refusing to compel the successful party to return what he collected under the judgment is a limitation of the doctrine of former adjudication never before tolerated by this court.

Jurisdiction.

Respondents, under a similar heading of their answer, appear to admit that the decision of the Supreme Court of Illinois is final and has brought to an end any relief that may be obtained by petitioners in the courts of that state.

In *People* v. *Orvis*, 312 U. S. 705, which refused *certiorari* on the decision of the Supreme Court of Illinois in *People* v. *Orvis*, 374 Ill. 536, because of lack of a final judgment, the decision of the Supreme Court of Illinois merely granted the taxpayer the right to file objections. The pleadings had not yet been filed. Here not only have the pleadings been filed, but a full hearing has been had, and there is no other relief possible to petitioners in the courts of Illinois.

It is respectfully submitted that jurisdiction exists in this case both because of certain legal effects that inevitably followed from the judgment of the United States District Court and because of the effort of the Supreme Court of Illinois to limit that judgment to its mere monetary result.

The position of Small and Inglesh, which is hereinafter defined, is, however, different from that of The Ohio National Life Insurance Company; for which reason the petition for certiorari is joint and several.

Petitioners again jointly and severally respectfully pray that the writ of certiorari be issued herein as they have heretofore prayed in their petition.

WERNER W. SCHROEDER,
Attorney for Petitioners.

THEODORE W. SCHROEDER,
A. F. BEAUBIEN,
Of Counsel.

ARGUMENT.

MAY IT PLEASE THE COURT:

I.

The validity of the bonds and of the validating act of 1935 were adjudicated by the United States District Court

Respondents' first contention that the validity of the bonds was not adjudicated cannot stand in view of the pleadings in the Federal District Court suit and the evidence pertaining to that case. Paragraph 3 of the complaint in the district court alleges the ruling in the first *Orvis* case and the passage of the validating act of 1935 which is set out in the paragraph, and then avers that by reason of said act all proceedings had in connection with the issuance of said bonds are expressly validated, and said bonds and the interest coupons thereto attached are valid and legally binding obligations of the defendant district. That sentence presented the issue which the district court considered and adjudicated (R. 83 to 84).

The answer of the district, after admitting the issuance of the bonds and failure to pay interest, neither admitted nor denied the validity of the validating act, and neither admitted nor denied that the bonds and interest coupons were valid and legally binding on the defendant district, which raised an issue and placed the burden of proof of the validity of the bonds and coupons on the plaintiff.

Recovery depended entirely on the effectiveness of the validating act of 1935. Without a ruling on that issue in

favor of plaintiff there could have been no money judgment.

It is not now denied by the district, nor in the opinion of the Supreme Court of Illinois, that those coupons were appurtenant to bonds upon which this suit is based and to which are attached later coupons upon which recovery is also sought.

Respondents now claim that the judgment, which necessarily upheld the validity of some of the coupons, is not *res judicata* of the validity of the bonds themselves or of subsequent coupons. They cite *Cromwell* v. *County of Sac*, 94 U. S. 351. That case has been misread by respondents. There in a previous suit upon interest coupons they had been held invalid, and since the plaintiff had not shown that he was a purchaser for value before maturity recovery was denied. The second suit was brought by the same plaintiff upon the bonds themselves and later coupons. In that action he offered to show that he was a purchaser for value before maturity. This court held that as to the validity of the bonds and coupons the adjudication in the earlier suit was conclusive against and binding on the plaintiff. The court said (page 359; 94 L. Ed. at 200):

> "Reading the record of the lower court by the opinion and judgment of this court, it must be considered that the matters adjudged in that case were these: that the bonds were void as against the County in the hands of parties who did not acquire them before maturity and give value for them, and that the plaintiff, not having proved that he gave such value, was not entitled to recover upon the coupons. *Whatever illegality or fraud there was in the issue and delivery to the contractor of the bonds affected equally the coupons for interest attached to them. The finding*

and judgment upon the invalidity of the bonds, as against the County, must be held to estop the plaintiff here from averring to the contrary." (Italics ours.)

But on the second issue, whether he was a purchaser for value before maturity, the court said:

"If, therefore, the plaintiff received the bond and coupons in suit before maturity for value, as he offered to prove, he should have been permitted to show that fact. There was nothing adjudged in the former action in the finding that the plaintiff had not made such proof in that case which can preclude the present plaintiff from making such proof here. The fact that a party may not have shown that he gave value for one bond or coupon is not even presumptive, much less conclusive, evidence that he may not have given value for another and different bond or coupon. The exclusion of the evidence offered by the plaintiff was erroneous, and for the ruling of the court in that respect the judgment must be reversed and a new trial had."

That case, rather than being an authority against petitioners, is one in their favor. It makes the significant holding that as the invalidity of the coupons was adjudged in the former action, that ruling is conclusive as to the invalidity of the bonds and of later coupons in a subsequent action.

In the later case of *Bissell* v. *Spring Valley Twp.*, 124 U. S. 225, 31 L. Ed. 411, plaintiff had previously brought action upon coupons which had been attached to certain municipal bonds. In that action it had been adjudged that the bonds to which they were attached were void because of certain informalities. Later he brought action upon other of the coupons attached to the same bonds. The plaintiff relied, as do respondents here, on *Cromwell* v. *Sac County*, claiming that the second was a different

cause of action. That contention was denied by this court through the same justice who had written the *Cromwell* opinion. It was said (page 236; 31 L. Ed. at 415):

> "There is nothing in that decision which can be made to support the contention of the plaintiff in this case. In the former action against the present defendant the adjudication was that the bonds themselves were never signed by the proper officers required by the statute of the State to sign them, and therefore they were not legal obligations of the Township. Their invalidity equally affected the coupons attached to them, and not merely those in suit, but all others. If the plaintiff could give any evidence consistent with that adjudication there would be no objection to his doing so, and the former action would not estop him; but the bonds being found to be invalid and void, he is precluded from attempting to show the contrary, either of the fact of their wanting the signature of the county clerk, or of the law that for that reason they were not binding obligations of the municipality. *The fact and the law are adjudged matters between the parties, and not open, therefore, to any further contest.*" (Italics ours.)

Later in *Southern Pacific Railroad Company* v. *U. S.*, 168 U. S. 1, 42 L. Ed. 355, the same principle was followed and applied in a suit involving title to lands. It was stated generally (page 48; 42 L. Ed. at 377):

> "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

In that case different lands were involved than in the prior judgment, but both cases involved certain maps of definite location. To a contention similar to that now made by respondents, this court replied (page 54; 42 L. Ed. at 379):

> "It is also said that the decision in the former cases concluded, at most, only the question of title in respect of the lands there in controversy. This cannot be correct when the lands in both suits have a common source of title, and the title depends upon the existence or nonexistence of the same fact or facts. If the accepted maps filed by the Atlantic & Pacific Railroad Company in 1872 sufficiently located the line of that company, it could not possibly be that they were valid maps of definite location as to part of the lands appertaining to that line, and not maps of that character in respect of other lands embraced by it. Consequently, the former judgment, while unmodified, determined the character of the maps, as between the United States and the Southern Pacific Railroad Company."

In the same case the court ruled on the contention, also here made (against Small and Inglesh), that estoppel needs to be pleaded. The court said (page 59; 42 L. Ed. at 380) that the record and judgment in the former case were admissible without being specially pleaded and stated:

> "Mr. Greenleaf correctly says that 'the weight of authority, at least in the United States, is believed to be in favor of the position, that where a former recovery is given in evidence, it is equally conclusive, in its effect, as if it were specially pleaded by the way of estoppel.' 1 Greenl. Ev. 531. This view is in accord with the decisions of this court above cited."

It has also been pointed out above that the stipulation of the parties made such pleading unnecessary. Of course, The Ohio National Life Insurance Company pleaded the former adjudication in its original complaint.

The lower federal courts have repeatedly followed the doctrine exemplified by those decisions of this court in holding that a judgment rendered in a suit upon coupons is conclusive upon the parties in a later suit upon the bonds themselves or upon subsequently maturing coupons. *Edwards* v. *Bates County*, 55 Fed. 438; *Gorham* v. *Broad River Twp.*, 109 Fed. 776; *Aetna Life Insurance Company* v. *Board*, 117 Fed. 82; *Hickman* v. *Town of Fletcher*, 195 Fed. 908; *Fitch* v. *Stanton*, 190 Fed. 310. In the last case a contention similar to that made by respondents was answered as follows:

> "The estoppel against appellant resulting from that judgment is not dependent upon the demand involved in this suit being the same as that involved in that suit; but is dependent upon the questions here involved being identical with those involved in, and determined by, that suit."

There the first suit was on coupons, the second suit on later maturing coupons.

The decisions of this court conclusively dispose of respondents' contention that because earlier coupons only were sued on in the former action the judgment is not binding in its determining effect in this suit upon later coupons and the bonds themselves.

These cases also demonstrate that the Supreme Court of Illinois did not give effect to the judgment of the district court when it limited that judgment in its effect to the recovery of the money represented by the coupons but refused to recognize the indispensable foundation of that recovery—the validity of the bonds.

Respondents (page 17) suggest that the recovery in the federal court may have been upon money had and

received or for the value of the use of money rather than upon the coupons themselves. But that contention is negative by everything in the record, even by respondents' assumptions in other parts of the answer. The complaint in the federal district court in paragraph 4 (R. 106) describes the interest coupons *sued on*. The fifth paragraph alleges that demand was made for the payment of interest coupons and that payment was refused. Those pleadings were narrowly limited to recovery on the interest coupons. There appears to have been no common count or any other general prayer for judgment which would have allowed recovery for money had and received.

It consequently appears that the pleadings admit of no other construction than that recovery was had upon the interest coupons, and that this recovery was based upon the validation of the bonds themselves, which was properly pleaded and which was the only issue raised by respondents' answer in that cause. It is impossible to look upon the proceedings in that case in any other way than as a determination of the validity of these bonds.

II.

Position of Small and Inglesh.

The petition for certiorari filed in this court is joint and several in form because of a realization that the position of Small and Inglesh is different from that of the Ohio National Life Insurance Company.

Small and Inglesh were not plaintiffs in the suit brought in the Federal District Court nor do they claim that they have derived any bonds from the Insurance Company.

They must rely upon the identity of their legal rights

with those of that company. In *United States* v. *California Bridge & C. Co.*, 245 U. S. 337 at 341, 62 L. Ed. 332 at 336, this court said:

> "The doctrine of estoppel by judgment, or *res judicata*, as a practical matter, proceeds upon the principle that one person shall not a second time litigate, with the same person or with another so identified in interest with such person that he represents the same legal right, precisely the same question, particular controversy, or issue which has been necessarily tried and finally determined, upon its merits, by a court of competent jurisdiction, in a judgment *in personam* in a former suit."

citing a number of prior decisions of this court.

The rights of Small and Inglesh are dependent upon the same legal right and precisely the same question as that underlying the claim of the Ohio National; their bonds depend for validity upon the same basis of law and fact as that upon which the demand of the Insurance Company in the federal court rested.

It was with the belief that their interests were sufficiently identical with those of the Insurance Company that Small and Inglesh joined in this joint and several petition for certiorari. If, however, the court were of the opinion that those legal rights are not sufficiently identical the petition filed in this cause must be regarded as the several petition of the Insurance Company.

The contention that Small and Inglesh did not specially plead the former adjudication has already been answered in the prior division of this reply.

III.

The State Court did not accord the Federal Court judgment the same effect it accords judgments of its own courts of equal authority.

The doctrine which petitioners claim is properly applicable here, that the decision by judgment upon a certain point is conclusive between the parties in all subsequent litigation between them, has been repeatedly recognized and applied by the Supreme Court of Illinois in reference to judgments of its own courts. Instances of such cases are to be found in *Winkelman* v. *Winkelman,* 310 Ill. 568; *Harding Company* v. *Harding,* 352 Ill. 417; *Wright* v. *Griffey,* 147 Ill. 496, and many other cases.

Petitioners' complaint is that the doctrine applied by the courts of Illinois to its own judgments has not been given effect in the case at bar, due in part to the fact that the Supreme Court of Illinois has confused the doctrine of former adjudication with that of "rule of decision."

IV.

The state court cannot deprive this court of jurisdiction by a holding which is obviously erroneous.

It is contended by respondents that the finding of the Supreme Court of Illinois that the issues here involved were not passed on by the district court was within the jurisdiction of that court and is conclusive under the ruling of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64.

Undoubtedly in the first instance the Supreme Court of Illinois was called upon to express its opinion of the effect of that judgment, but if, as we contend, its construction of that record is palpably wrong, it cannot deprive

this court of jurisdiction or the petitioners of their rights by such an erroneous ruling. If that were possible, the error of a state court could always defeat the jurisdiction of this court. Such an idea involves an inherent contradiction. It is the error of the court of Illinois in refusing to give the federal court judgment its proper and obvious effect which is cause for complaint and the ground upon which the jurisdiction of this court must rest.

V.

The issuance of the writ is respectfully requested.

It is respectfully suggested that the *Cromwell* case does not support respondents' position in this cause. That the validity of the bonds was put in issue by the prior suit on the coupons cannot be denied. This petition is not, as stated by respondents, a "bold assertion" but a sincere effort to recover from the School District the money which it has undeniably received and which it retains to its own benefit.

Petitioners again jointly and severally pray that the petition for certiorari be granted.

Respectfully submitted,

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